UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

Cranberries Grown in the States of Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington, and Long Island in the State of New York	Docket Nos. AO-341-A6; FV02-929-1

Exceptions to the Recommended Decision issued by the Dept. Of Agriculture on April 28, 2004, 69 Fed. Reg. 23330-23367

The Cranberry Marketing Committee (CMC) met, via conference call, on May 13, 2004, to review the proposed rules contained in the Recommended Decision, to amend the Cranberry Marketing Order (CMO), published in the Federal Register/Vol.69, No. 82, Wednesday, April 28, 2004, page 23330.

The Committee is in agreement with the revisions made to the following sections of the Cranberry Marketing Order as published in the Federal Register/Vol.69, No. 82, Wednesday, April 28, 2004: §929.10, Handle, §929.28, Redistricting and reapportionment, §949.45, Research & development, §929.46 Marketing policy, §929.47, Preliminary regulation [Removal], §929.50 Transfers of sales histories and annual allotment, §929.51, Recommendation for regulation, §929.52, Issuance of regulations, §929.54, Withholding, §929.58, Exemptions, §929.61, Outlet for excess cranberries, §929.62, Reports, and §929.64, Verification of reports and records.

The Committee is filing exceptions to sections: §929.48, Sales History, §929.49, Marketable quantity, allotment percentage, and annual allotment, and §929.56 Special provisions relating to withheld (restricted) cranberries for the

purpose of clarification and conformity.

The Committee is also filing an exception to Material Issue #17. Whereas the USDA's decision to not revise §929.17, to add the States of Maine, Delaware and the entire State of New York as part of the production area denies those growers in the production area and subject to the provisions of the marketing order equality with growers in outside the production areas not subject to the marketing order. This would also include handlers in those areas who are not subject to the same reporting requirements that handlers in the production area are.

§929.48 Sales history

The Committee testified during the public hearings held that it recommended revising this section to allow the Committee to adjust eligible growers sales history using a method referred to as "ramp-up" during period[s] when a producer allotment regulation had been established by the Secretary USDA.

Using the "ramp-up" method eligible growers who would be producing cranberries from newly planted or replanted (renovated) acreage that were less then five years old would have their sales history adjusted in accordance with §929.48(b), as revised.

In comments filed following the conclusion of the public hearings the Committee went on record to clarify its earlier testimony that the calculation of additional sales history calculation, referred to as ramp-up, using the formulas established in this section would only occur during periods when a producer

allotment regulation has been established by the Secretary USDA. The Committee would not calculate or adjust sales history using the "ramp-up" formula during periods of non-regulation.

In the Recommendation Decision §929.48, as revised, paragraph (b) states that, "A new sales history shall be calculated for each grower after each crop year (emphasis added), using the formulas established in paragraph (a) of this section, or such other formula[s] as determined by the committee, with the approval of the Secretary."

It's the Committee's position that paragraph (b), as stated in the Recommended Decision, does not correctly reflect that the Committee would calculate a grower's sales history, and where applicable adjust such sales history using the ramp-up formula, during periods in which a producer allotment regulation had been established prior to, not after, harvest. The Committee is recommending the Department revise paragraph §929.48(b) prior to the issuance of the Secretary's Decision, as such: "A new sales history shall be calculated for each grower during periods when a producer allotment regulation has been established **prior to the beginning of the next crop year,** using the formulas established in paragraph (a) of this section, or such other formula[s] as determined by the committee, with the approval of the Secretary." (emphasis added)

§929.49 Marketable quantity, allotment percentage, and annual allotment

The Committee originally proposed and testified to revising paragraph (f) of this

section by adding the following sentence to the end of the paragraph: "If a grower does not specific how their annual allotment is to be apportioned among the handlers the committee will apportion such annual allotment equally among those handlers they are delivering their crop to." [OR tr. P. 157 (HILLER)]

Section 929.49(f), as revised, and published in the Recommended Decision does not contain the aforementioned language. The Committee believes this may have been an oversight and was overlooked during the Department's review process and wish to bring it to the Department's attention for inclusion. It's the Committee's position that situations will develop where during period in which a producer allotment regulation is in effect growers selling to more than one handler will fail to provide the Committee with the information necessary to apportion their annual allotment among the handlers they will be delivering cranberries to.

During the two crop years, 2000 and 2001, when the regulation was in effect the Committee found that not having specific language in the marketing order on how this situation would be handled resulted in delays in apportionment and caused disagreements among the handlers as to how much of grower's annual allotment they each were entitled to. This places a burden on the Committee who in some cases had to repeatedly try to contact growers, sometimes unsuccessfully, to secure the information on how the grower wanted his/her allotment apportioned among the handlers they deliver to.

Adding the sentence to the end of paragraph (f) would not only provide clarity

to interpreting this section, as well as provide the Committee with the means to apportion annual allotment of non-responsive growers to handlers in a fair, equitable and timely manner.

Upon the Committee's review of paragraph (g) of this section it was determined that it is in conflict with §929.50(b). Section 929.49(g) states, "Growers who do not produce cranberries equal to their computed annual allotment **shall** transfer their unused allotment to such growers' handlers" (emphasis added). While Section 929.50(b), Allotment transfers, states, "During a year of volume regulation, a grower **may** transfer all or part of his/her allotment to another grower" (emphasis added). As stated, having shall appear in §929.49(g) in effect negates the growers ability to transfer their allotment to another grower[s] as provided in §929.50(b).

The Committee approved action, at its May 13 conference call, to recommend the Department revise §929.49(g) by striking the word **shall** and replacing it with the word **may**. Having the word **may** appear in both §929.49(g) and §929.50(b) will not only provide consistency, but allows growers with unused allotment the choice of either transferring their unused allotment to their handler under §929.49(g) or to another grower under §929.50(b).

The Committee also concluded that its recommendation to revise §929.49(g) by replacing shall with may and the revision made to §929.50(b) allowing the transfer of allotment among growers delivering to the same handler, the inclusion of paragraph (i) in this section is no longer necessary. The Committee is recommending that paragraph (i) be deleted and that paragraph (j) be re-designated

as paragraph (i). It's the Committee's position that growers have an alternative option available to them under §929.50(b), as revised, previously not contained in the marketing order so they would not have to sign over their allotment to their handler[s].

During the hearing process Attorney Steve Lacey posed a question as to whether adoption of this paragraph, §929.49(i), would infringe on contractual agreement between a handler and grower wherein the contractual agreement specified that the grower would transfer their allotment to the handler regardless if a crop was produced or not. The Committee manager responded that the intent of this paragraph (i) was not to usurp any contractual agreements between the grower and handler in this regard. [MA tr. P. 340-343 (FARRIMOND/LACEY)]

However, the question which remains is what would happen to a grower's allotment if §929.49(i) were to remain as an option under the marketing order. Since the calculated allotment would be part of the marketable quantity most likely in a situation where a grower decided not to grow a crop, and was not under a contractual obligation to surrender their allotment to a handler and did not wish to transfer their allotment to another grower, under §929.50(b) as revised, the allotment would revert back to the Committee where it could be redistributed out to handlers holding excess cranberries, which would include the same handler the grower choose not to assign his/her allotment to originally.

The Committee is also concerned that by retaining paragraph (i) that if a sufficient number of growers, for whatever reason, decided not to grow a crop and would not relinquish their annual allotment to their handler then that handler may be unable to reach their marketable quantity, which would have a negative impact

on seeking out potential sales, let alone meeting its established sales commitments.

There was testimony made during the public hearings to have the Committee establish rules and regulations that would not allow the redistribution of allotment. The Committee believes that this could have an adverse effect on the total marketable quantity needed by handlers to meet total demand and to ensure an adequate carryover. Based on the complexity of developing specific rules and regulations to address this issue and with the approval of the recommended change to paragraph (g) of this section, coupled with the grower's ability to transfer allotment under §929.50(b) it's the Committee's position that paragraph (i) is no longer needed and should be deleted from the section.

§929.56(e) Special provisions relating to withheld (restricted) cranberries.

The Committee supports adoption of this revised section with the following modification. The committee is recommending that the last sentence in paragraph (e) be modified to read as follows: "Any funds received by the committee for cranberries so disposed of, which are in excess of the costs incurred by the committee in making such disposition ~~will accrue to the committee's general fund~~ **would accrue to the handler who deposited the funds for the release of withheld cranberries to be distributed proportionately to the handlers' growers affected by the volume regulation.**" (emphasis added)

The Committee believes that any funds left after disposing of restricted cranberries should be redistributed to the growers of the handler who deposited the

funds for releasing the withheld fruit and not to the Committee's general fund. The Committee believes that the distribution of these funds would be done on a proportional basis to only those growers affected by the volume regulation.

Material Issue 17 – Expansion of Production Area

The Committee has reviewed the USDA's arguments for rejecting the proposed rule to expand the production area, §929.4, to include the States of Maine, Delaware and the entire State of New York. It is the Committee's position that the arguments put forth by the USDA in making this decision are not in the best interest of the cranberry industry, and therefore petition the USDA to reconsider its decision to exclude this proposed rule for consideration by the industry.

As stated in the USDA's reasons for not revising this section is that this proposed rule is contrary to the Act requires that a marketing order be limited to the smallest regional production area. The proposed rule does just that. The Committee is not proposing that the States of North Dakota, Nebraska, Mississippi, Nevada, or any of the other areas in the United States where cranberries could be commercially produced in the future be added to the production area. However, the Committee proposed and continues to strongly support giving the growers the opportunity to vote in a referendum to decide whether these three cranberry producing areas which are not included in the current production area, §929.4, CMO, should be added to the proposed production area.

The USDA has offered up numerous arguments and various rationale to

deny the cranberry industry the opportunity to vote on adding these three production areas to the marketing order. The USDA cited testimony given at the hearings by opponents that claimed that by being included in the production area that the uniqueness of cranberries grown in Maine would somehow be diminished and the "Maine mystique" would be lost to supprt not including that state! However, the largest cranberry grower in Maine stated at the hearing that he was in favor of having Maine included in the production area. The USDA cannot be serious to consider only the arguments put forth by one side as reasonable justification for not revising this section, thus denying the industry the opportunity to vote on whether or not to do so.

Another argument put forth was by the USDA was that their [Maine, New York, and Delaware] inclusion under the marketing order would have no impact on the level of volume regulation that would need to be imposed to reduce supply. As testified to at the hearings the majority of the cranberries grown in Maine are commercially sold as fresh. During both the 2000 and 2001 crop years in which a producer allotment program was established fresh fruit was exempted from the regulation. In other words if Maine had been included in the production area the impact, if any, from the producer allotment regulations would have been minimal at worst and none at best.

The USDA also points out that there are only 2 growers in New York, 1 grower in Delaware and 39 growers in Maine. In comparison, there are only two growers in Rhode Island, seven in Michigan and 42 in New Jersey that are subject to

the provisions of the marketing order.

The USDA mentions the expanded data collection authority as one means in which to collect data from any handlers and processors located in Maine, New York or Delaware without having to bring them under the marketing order. The authority was granted in October 1999. Just last month the proposed change to Part 929 was released for comment. The USDA stated that after the comments received were reviewed by the USDA, AMS intended to request approval of the new data collection and reporting requirements by the Office of Management and Budget. Is there any reason not to believe that further review will most likely result in further delay in establishing and implementing this authority to collect acquisitions, dispositions and inventory data from handlers, processors, brokers and importers from both inside and outside the established production areas?

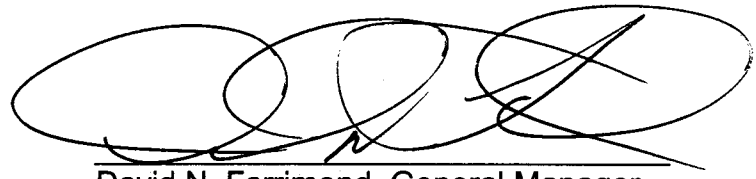
The Committee is aware of at least two handlers in Maine that are sourcing cranberries from Canada. Contrary to the testimony given by opponents that Maine growers would continue to provide production information to the National Agricultural Statistics Service (NASS), NASS does not collect data on foreign acquisitions made by handlers. Only the Committee collects that information. Thus any Canadian cranberries coming into the U.S. through Maine handlers is not being accounted for. Such information would be useful to the Committee to determine if volume control is necessary and the amount of cranberries that should be withheld or restricted. Adding these three production areas under the marketing order would provide the Committee with the authority to collect such data and to audit these handlers, as it

does with all handlers subject to the marketing order provisions, to ensure the industry is provided with the most accurate information on domestic and foreign acquisitions, dispositions and inventories.

During the 2000 crop year the USDA established a Cranberry Market Loss Program. Under that program growers received approximately $5.00 per barrel, up to a predetermined production level, based on the 1999 crop year production. Cranberry growers eligible to participate in the program included not only the growers in the production area, but also cranberry growers from Maine. The Committee assisted the USDA by gathering production data from Maine handlers, who provided the production data on a voluntary basis, so Maine growers could participate in the program. So, it is difficult to understand why growers from Maine who received benefits [funds] through the market loss program should not be included in the production area, when Maine cranberries are indistinguishable from other cranberries for purposes of them receiving assistance from a federal government program.

Given the facts, it is the Committee's belief that the USDA should seriously consider reversing its earlier decision not to revise §929.4, Production area, and to included the proposed rule in the Secretary's Decision and allow cranberry

growers to vote in a referendum on whether or not to include Maine, New York and Delaware under the marketing order.



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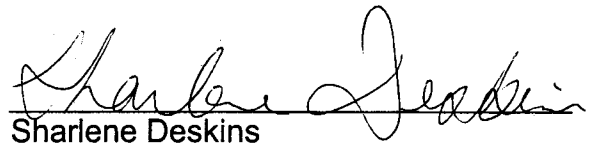

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